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In the Supreme Court of the United States

OCTOBER TERM 1969

No. 829

GENEVER LEWIS, et al.,
Appellants,

vs.

ROBERT MARTIN, Director of the State Department of Social Welfare of the State of California, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Brief for Appellees

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On Appeal from the United States District Court for the Northern District of California

Brief for Appellees

QUESTIONS PRESENTED

The Social Security Act of 1935 (49 Stat. 620), as amended, 42 U.S.C. §§ 301-1394) requires California, in determining the eligibility of a claimant of benefits under the Aid to Families With Dependent Children (AFDC) program,[1]

1. The AFDC program is one of the categorical aid programs established by the Social Security Act. It is cooperatively funded by the various states and the federal government. See 42 U.S.C. §§ 601-609 (1965). California participates in the program (Cal. Welf. & Inst. Code §§ 11200-488).

to consider the income and resources of any child or relative claiming aid or of any individual living with such child or relative.[2] By California law, both a stepfather of such child or a "man assuming the role of spouse" (MARS) to such child's mother, is obligated to support such child to the extent he is able.[3] Under these circumstances:

1. Can the Department of Health, Education and Welfare (HEW), by attempted administrative regulation,[4] prevent California from considering the income of a stepfather or a MARS as a resource of an AFDC-claimant child or relative unless the State proves that such child or relative actually receives contributions from the stepfather or MARS?

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2. The Social Security Act requires California, and all other participating states, to submit a plan of operation to the Secretary of HEW for approval. 42 U.S.C. § 601, 602, 603, 604 (1965). Each state plan must provide, *inter alia*, that the state "shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid . . . , or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming aid. . . ." 42 U.S.C. § 602(a)(7), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881.

3. The California statute imposing support obligations on a stepfather or MARS, Welfare and Institutions Code section 11351, was amended and section 11351.5 added in 1969, with the amendments having a stated effective date of November 10, 1969. The text of section 11351, prior to amendment is set forth in Appendix A, *infra*. The text of *amended* section 11351, and section 11351.5, is set forth in Appendix B, *infra*.

Appellants concede, as they must, that the question of the validity of the statutes as amended was not decided by the District Court and is not before this Court. Appellants' Brief, Appendix H. Consideration in this appeal, and in this brief, is limited to questions concerning the statute prior to amendment.

4. The HEW regulation (45 C.F.R. § 203.1) is set forth in Appendix C, *infra*.

2. Does the Equal Protection or Due Process Clause of the Fourteenth Amendment preclude California from decreasing the amount of public assistance of an AFDC-claimant child or relative by the amount which California obligates a stepfather or a MARS to contribute to the support of such child or relative?

SUMMARY OF ARGUMENT

The State of California requires by state law (Cal. Welf. & Inst. Code § 11351) that a needy child living with his mother and a stepfather or a "man assuming the role of spouse" (MARS) to the mother must be supported by such "man-in-the-house," to the extent of his ability, if, without such support, the child and mother would require public assistance through the Aid to Families With Dependent Children (AFDC) program (42 U.S.C. §§ 601-609). In imposing that obligation on the man, a corelative cause of action is created in the child for a breach of the statutory duty. Cal. Civ. Code §§ 241, 245, 248. Additionally, in the case of a stepfather, the child's mother under California community property law, has a "present, existing" (Cal. Civ. Code § 5105) right to one-half of her husband's (the stepfather's) earnings. These statutory "resources" of the child and mother claiming AFDC assistance are "considered" by California in "determining" the reduced "need" of the aid-claimants, as Congress has directed that they "shall" be. 42 U.S.C. § 602(a)(7).

The Department of Health, Education and Welfare (HEW), on the other hand, by attempted administrative regulation (45 C.F.R. § 203.1) has purported to disallow consideration by California of these "resources" of the child and mother claiming aid. HEW will allow California to consider a child living with a stepfather or MARS to

be less in need of taxpayer support (through expenditure of AFDC funds) only to the extent that California can perform the administrative miracle of proving in thousands of cases each month the exact dollar-amounts that the stepfather or MARS has paid to the child in obedience to California law.

This blanket determination by HEW that a California stepchild or "MARS-child" can have no "resources" other than proven income is illegal. It flies in the face of the Congressional expectation that a "breadwinner"—a man under a legal child-support duty—will obey the law and support the children in his home, *King v. Smith,* 392 U.S. 309, 329 (1968), and thus provide resources to the child which lessen the need for AFDC assistance.

In determining the extent of the stepfather's or MARS's ability to support the children in his home, California sets a priority on the child support obligation and prevents the man from squandering his earnings on other luxuries and then attempting to demonstrate that he cannot support "his" children. Equality of treatment is thus afforded to all needy children and the various types of "fathers"—natural, adoptive and stepfathers as well as MARS's—with whom they live. All "fathers" must, first of all, support the children in their homes. None of them can justify non-support by pointing to payment books for costly automobile or color television loans. By affording equality of treatment for all needy children who live with a mother and a man-in-the-house, irrespective of his marital status or biological links with the child, parity is established for all and the premium or bonus which would otherwise attach to informal marriages is eliminated.

ARGUMENT

I. The California "Substitute Father" Rules, But Not the HEW Regulation With Which They Conflict, Comport With Requirements of the Social Security Act.

The Aid to Families With Dependent Children (AFDC) program, being "based on a scheme of cooperative federalism," *King* v. *Smith*, 392 U.S. 309, 316 (1968), has as a requirement that the various state AFDC programs must conform (see 42 U.S.C. §§ 601, 602, 603, 604) to certain minimal requirements specified in the Social Security Act. One of those requirements, contained in section 402(a)(7) of the Act, is that the state "shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid . . . , or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming aid. . . ." 42 U.S.C. § 602(a)(7), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881.

The dispute is this case concerns the proper interpretation of section 402(a)(7) of the Act with respect to the method of determining the "need" of a child living in California with his mother and either a stepfather or a "man assuming the role of spouse" (MARS) to the mother.

On the one hand, California obligates a stepfather or a MARS to support a needy child in his home if he is able. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*). To the extent to which California determines the man able and obligated to support the child, the State regards the child as having a resource which must be considered in the determination of need, and thus of extent of eligilibity to receive AFDC benefits. The amount of the public assistance grant is adjusted downward accordingly.

The Department of Health, Education and Welfare does not share California's view of the dictate of section 402 (a) (7) of the Act. Rather, HEW has ruled, effective August 8, 1968 (33 Fed. Reg. 11290), that with respect to a stepfather or MARS, a state may reduce the amount of AFDC assistance only to the extent that the state can prove *actual contributions* by the man to the AFDC child. 45 C.F.R. § 203.1 (Appendix C, *infra*).[5]

While the conflict between HEW (and appellants) and the State of California is clear, it should be stressed that California does not base its position in any way on the archaic and discredited argument (see *King* v. *Smith, supra,* 392 U.S. at 333 n. 34 and cases cited therein) that it need not comply with section 402(a)(7) as a condition of receiving federal funds for operation of the AFDC program in California. California must comply with section 402(a)(7). However, *so must HEW. King* v. *Smith, supra,* 392 U.S. at 333 n. 34. The Secretary of HEW has the "power to fill up the details," *United States* v. *Shreveport Grain & Elevator Co.,* 287 U.S. 77, 85 (1932), but that authority is limited to promulgating "rules and regulations not inconsistent with" the Social Security Act. 42 U.S.C. § 1302. It is axiomatic that the Secretary is "required to follow Congressional mandate, whether explicit or ascertainable as inherent in underlying policy," *United Steel Workers of America v. N.L.R.B.,* 390 F.2d 846, 851 (D.C. Cir. 1968), *cert. denied,*

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5. The HEW regulation does not require proof of actual contributions from a stepfather if he is "legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." 45 C.F.R. § 203.1(a). Since stepfather liability differs from natural father liability in California (compare Cal. Civ. Code § 209 and Cal. Welf. & Inst. Code § 11351 with Cal. Civ. Code §§ 242 & 196a), proof of actual contributions by a stepfather would appear to be necessary under the HEW rule.

391 U.S. 904, and "[a] regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. C.I.R.*, 297 U.S. 129, 134 (1936).

In this case, as the District Court correctly held,

> "By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of . . . [section 402(a)(7) of the Act] to consider 'other resources of the child.' It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the Congression [sic] mandate are, in the view of this court, invalid." A. 40 (material in brackets added.)

A. The HEW Regulation Conflicts With the Express Provisions of the Social Security Act.

Congress has commanded California to consider *any* income *and* resource of a child or relative claiming AFDC assistance as an essential determinant of the need of the claimant. 42 U.S.C. § 602(a)(7). In issuing that directive, Congress used the conjunctive "income *and* resources." Obviously, it contemplated that something more than *actual income* of the child must be considered, *viz.*, other resources. On its face, the HEW regulation (45 C.F.R. § 203.1, Appendix C, *infra*), as applied to a stepfather or MARS in California, is in direct conflict with this requirement of the Act. It purports to allow California to consider only the *income* which the state can prove was actually contributed to the child. Indeed, by administrative fiat, an AFDC child living with a stepfather or MARS is declared to be incapable of

having "resources" other than actually proven income. After ad hoc examination, it might be determined that a particular child or group of children may in fact be without resources, but to pronounce all children *living with* a MARS or stepfather to be *a priori* resourceless is to belie the obvious, at least in California. Moreover, that pronouncement by HEW (45 C.F.R. § 203.1) is in direct contravention of section 402(a)(7) of the Act, and is invalid.

B. The HEW Regulation is in Excess of the Purposes, as Articulated by This Court, of the AFDC Program.

A federal administrative regulation, such as the one of HEW at issue in this appeal, must comport with the enabling legislation, *including* the Congressional mandate as it is "ascertainable in underlying policy." *United Steel Workers of America* v. *N.L.R.B.*, 390 F.2d 846, 851 (D.C. Cir. 1968), *cert. denied*, 391 U.S. 904. The purposes of the AFDC program are easy of ascertainment for they are forcefully articulated and delimited by this Court in *King* v. *Smith*, 392 U.S. 309 (1968). Simply stated, "AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply securing employment for family breadwinners." *Id.* at 329-30. Congress assumed that a "breadwinner" would support his children, thus obviating or lessening the need for public support of the child. "This congressional expectation is most reasonably explained on the basis that the kind of breadwinner Congress had in mind was one who was legally obligated to support his children." *Id.* at 329. Congress used the shorthand label "parent" for the type of breadwinner contemplated and provided for AFDC eligibility for the limited group of needy children who lacked the resource of a support obligation owed by such a person. *Id.*

Nowhere in the *King* decision does this Court indicate that blood ties between the breadwinner and the child or marriage vows between the wage-earner and the child's mother, are the bases for the Congressional expectation of parental support such as to obviate or lessen the need for AFDC assistance. That decision makes absolutely clear that the essential factor, rather, is the existence of a breadwinner's legal duty to support the child and the Congressional expectation of obedience to the law.

The HEW regulation is founded on a premise quite different from the one articulated by this Court in *King*. HEW has ruled that only a natural or adoptive parent or a stepparent who is legally obliged to provide child support to the same extent as a natural parent can ever be a "parent" within the meaning of the Social Security Act. 45 C.F.R. § 203.1(a). Thus, HEW's expectation apparently is that a child derives economic protection from his biological links with a father or from his mother's marriage certificate. 45 C.F.R. § 203.1(a). But since Congress anticipates that "meaningful economic security," 392 U.S. at 332, inures to a child to whom any "breadwinner" owes a legal duty of support, HEW may not, as it has attempted, vary that Congressional expectation, or purport to compel California to deviate from the Congressional scheme.[6]

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6. As appellants candidly assess the situation (Appellants' Brief at 19), HEW has decided to outlaw "substitute parent" rules—irrespective of circumstances—as indeed it has. Appellants, however, express no alarm over this since they characterize the HEW regulation merely as reflecting a "recurrent theme" of HEW that income and resources may never be "assumed," but rather, must always be proved to have been "actually received." Appellants' Brief at 18.

The evil of the HEW regulation is that it prohibits California from considering a resource of AFDC claimants —a resource which is very real and which offers "parental" economic protection to the claimants in lieu of expenditures of public assistance funds. That resource of the claimants is the support obligation owed them by the stepfather or MARS. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*).

To be sure, there has been an undercurrent theme in HEW pronouncements that income is not to be assumed in determining need. See HEW, *Handbook of Public Assistance Administration*, Part IV, § 3120, 3131(7) (Appendix C, *infra*); HEW, Interim Policy Statement No. 4 (33 Fed. Reg. 10230, July 17, 1968); 45 C.F.R. § 203.1(b). Equally certain is the fact that the theme has received a "stamp of approval" by this Court. *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).

However, the doctrine of "non-assumption of income" has always been a limited one—a doctrine applied only to an *absent* "parent." Throughout all of the HEW pronouncements, including the presently-in-force regulation (45 C.F.R. § 203.1) allowance is made for "assumed income and resources" of a needy child *living with* an employed natural or adoptive father. And clearly, this allowance must be made because Congress requires it. Congress anticipates that a "*breadwinner*"—a man legally-obligated to support a child—will support the children *in his home*. *King* v. *Smith*, *supra*, 392 U.S. at 329. Necessarily implicit in that anticipation or expectation is the "assumption" of the "breadwinner's" income inuring to the benefit of the child through the legal support duty. And clearly, that "assumption of income" doctrine has the "stamp of approval" of this Court in *King* v. *Smith* to the extent that it is applied to a *support-obligated* man-*in-the-house*. In no way can the decision in *King* v. *Smith* be read to necessitate or justify an administrative prohibition against all "assumption of income" or against all "substitute parent" rules. In *King*, Mr. Williams, the paramour of Mrs. Smith, with whom she had an occasional rendezvous, was only a "transparent fiction," *Id.* at 334, of a substitute father. In comparison, a MARS in California, is by definition (see California, State Department of Social Welfare, Public Social Services Manual §§ 42-515, 42-535, Appendix D, *infra*) living with the AFDC-claimant child and mother, and must by California law (Welf. & Inst. Code § 11351, Appendix A, *infra*) support them. There is no "recurrent theme" of "non-assumption of income" in either the statements of HEW or of this Court which may be applied to a MARS, or, *a fortiori*, a stepfather in California.

California imposes a legal duty of support on all "fathers"—natural[7] and adoptive[8] fathers and upon a stepfather and a MARS.[9] Concededly, the extent of the "parental" liability is different. The duty on the natural or adoptive father is unqualified by the statute, whereas the obligation of a stepfather or MARS is a limited one. However, that difference is also reflected in the treatment of the respective children concerning their AFDC eligibility. The child living with a natural or adoptive father is ineligible for AFDC assistance,[10] since, by definition, the child is not "dependent," 42 U.S.C. § 606(a), because of the father's presence and the existence of the support obligation. *King v. Smith*, 392 U.S. 309 (1968). The child living with a stepfather or MARS is less protected because the man owes the child a possibly lesser duty. California recognizes this and, unlike Alabama in *King v. Smith, supra*, 392 U.S. at 313, does not automatically totally disqualify the stepchild or "MARS-child" from AFDC eligibility. California does not define the child as "non-dependent." Rather it measures the amount of economic security inuring to the child from

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7. Cal. Civ. Code § 242: "Every man shall support . . . his child."

8. Cal. Civ. Code § 228: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."

9. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*).

10. An exception to this rule is that the states are allowed the option of considering as dependent children those living with an unemployed natural parent. 42 U.S.C. § 607. See *King v. Smith*, 392 U.S. 309, 313 n. 7, 318 n. 13 (1968). California does participate in this optional "AFDC-U" program. Cal. Welf. & Inst. Code § 11250(c). This unusual program is not pertinent to the issues of this appeal.

the support obligation fixed by law, "considers that a resource" [42 U.S.C. § 602(a)(7)], and accordingly determines the lessened need of the AFDC claimant.

The support obligation imposed on stepfathers and MARS's in California is not merely something totally ephemeral or a figment of the imagination of welfare administrators. It is of real legal substance,[11] creating as it does, a duty of support on the obligor-man and, of course, a corelative cause of action in the obligee-child for a breach of the duty. Cal. Civ. Code §§ 241, 245, 248;[12] Note, *Social*

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11. In addition to "legal substance," an observation of Professor tenBrock should be noted:

> "Quite regardless of the presence or absence of legal liability, most stepfathers do support their stepchildren. As a practical matter, they can hardly avoid it. They all live under the common roof, view the common television and the stepchildren cannot very well be driven from the table when the parents and other children are eating." tenBrock, *The Impact of Welfare Law Upon Family Law*, 42 Calif. L. Rev. 458, 479 (1954).

Professors Lewis and Levy seem to concur in this observation. Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 Calif.L.Rev. 748, 764-5 (1966). The observation, while made about stepfathers, would seem to be equally apt in the case of a MARS, at least in the case, such as the Lewis appellants (see Appellants' Brief at 10), where the MARS takes the woman and children into *his* home. At the very least, he is supporting them for purposes of their shelter needs.

It is, of course, the immense difficulty of measuring the extent of the contributions in thousands of cases each month, that has prompted, at least partially, the enactment of Welfare and Institutions Code section 11351. See *People* v. *Shirley*, 55 Cal. 2d 521, 525, 360 P.2d 33, 35 (1961).

12. Civil Code Sections 241, 245, and 248 are provisions of the California version of the Uniform Civil Liability for Support Act and appear in Division 1, Part 3, Title 3 of the California Civil Code. In pertinent part, they provide as follows:

Section 241: "As used in this title:

• • •

"(b) 'Obligor' means *any person* owing a duty of support."

"(c) 'Obligee' means *any person* to whom a duty of support is owed." (Emphasis added)

Section 245: "The superior court shall have jurisdiction of all actions brought under this title."

Welfare: Aid to Needy Children: "Liability of Cohabiting Male for Support," 9 U.C.L.A.L. Rev. 261, 263-4 (1962); *People v. Shirley*, 55 Cal.2d 521, 529, 360 P.2d 33, 37-38 (1961) (Peters, J., dissenting).[13]

Appellants undoubtedly will retort that an AFDC child or mother is too poor to initiate legal proceedings to vindicate his rights. With the extensive network of highly active legal offices for the poor in California (of which the various counsel for appellants are a part), one must question that contention. But the point is not pertinent. An equally impoverished child living with a natural father who fails to fulfill his obligation of support can likewise perhaps not afford to bring legal action against the man.[14] Nonetheless,

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Section 248: "The obligee may enforce his right of support against the obligor and the county may proceed on behalf of the obligee to enforce his right of support against the obligor. Whenever the county furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. The right of the county to reimbursement shall be subject to any limitation otherwise imposed by the law of this State."

13. Appellants state that they assume on this appeal that such a cause of action does exist. Appellants' Brief at 7-8 n.5. Some decisions of the intermediate California appellate courts question, without having to decide, the proposition. *People* v. *Rozell*, 212 Cal. App. 2d 875, 28 Cal. Rptr. 478, 480-81 (1963); *County of Kern* v. *Coley*, 229 Cal. App. 2d 172, 180, 40 Cal. Rptr. 53, 58 (1964); *People* v. *Owens*, 231 Cal. App. 2d 691, 697, 42 Cal. Rptr. 153, 157 (1965). The California Supreme Court has not spoken definitively on the subject; Mr. Justice Peter's dissent in *People* v. *Shirley*, 55 Cal. 2d 521, 529, 360 P.2d 33, 37-8 (1961) is the most precise statement from that court on the issue. Recently, the question was averted, as being unnecessary to a decision, by the California Supreme Court. *People* v. *Gilbert*, 1 Cal. 3d 475, 482-4, ... P.2d ..... (1969).

14. Moreover, the law imposing support liability on a MARS in particular, has perhaps even a greater "clout" to it than the laws obligating a ceremonially married father. Unfettered by the prospects of a costly divorce to undo a formal marriage, the woman living with a MARS has an additional weapon conferred by Welfare and Institutions Code section 11351. As Professors Lewis and Levy put it, the "MARS-woman" can threaten, with real

because of the state-imposed legal duty of support on the man, Congress anticipated that the law would be obeyed, *King v. Smith, supra,* 392 U.S. at 329, thus obviating or lessening the need for AFDC assistance. California shares that expectation with respect to all "fathers" on whom it imposes a support duty.

Moreover, in the case of the stepfather in California—the man who has ceremonially wed the mother claiming AFDC on behalf of herself and her child—the presence of the "resource" of the aid-claimant, which the Social Security Act commands be considered [42 U.S.C § 602(a)(7)], is even clearer.

As part of its Spanish heritage [see 1 Armstrong, *California Family Law* 431-2 (1953)], California maintains

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meaning, " 'Support me and the kids,' [Mr. MARS,] 'or out you go!' " Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 Calif.L.Rev. 748, 779 (1966) (material in brackets added.)

That certain MARS will respond to the mother's threat by leaving rather than paying the support is, of course, a possibility. Appellants embellish their statement of the facts of this case with a recital that this kind of drama has occurred to them. Appellants' Brief at 10-11. Such occurrances *may* be a socially undesireable phenomena, but the law which causes results which are possibly "unwise, improvident, or out of harmony with a particular school of thought," *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955), is not thereby defective under the Constitution. There is nothing in the Social Security Act which indicates that Congress was, or is, of the opinion "that children will develop more favorably without a 'father' than they will with a financially able 'father' who refuses to support them," Lewis & Levy, *supra,* 54 Calif.L.Rev. at 780—or vice-versa for that matter. All that Congress expects is that a man who is obligated to support a child will do so. *King* v. *Smith*, 392 U.S. 309, 329 (1968). Thus, since neither the Act of Congress nor the Constitution proscribes the enactment of a law by California which *may* cause a MARS to desert his family, if appellants believe that the possible effect of the law is so socially unsound as to warrant a change in the law, they should seek to have legislators, not Justices of the Supreme Court, make the change. *Cf. Ferguson v. Skrupa,* 372 U.S. 726, 729-80 (1963).

a system of community property between spouses. All property, including earnings, acquired by either husband or wife during marriage, other than by gift, bequest, devise, or descent, is community property. Cal. Civ. Code §§ 5107, 5108, 5110.[15] Significant in the California marital property system, for purposes of the present inquiry, is the law that "[t]he respective interests of the husband and wife in community property during continuance of the marriage relation are *present, existing,* and *equal* interests . . . ." Cal. Civ. Code § 5105 (Emphasis added).[16] Thus, by express statute, one-half of the husband's earnings is the wife's—an interest "existing" at "present."[17] Totally aside

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15. Cal. Civ. Code § 5107: "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property."

Cal. Civ. Code § 5108: "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."

Cal. Civ. Code § 5110: "All other real property situated in this state and all other personal property wherever situated acquired during the marriage by a married person while domiciled in this state is community property . . . ."

These three sections of the California Civil Code bear new numbers (5107, 5108, 5110) effective January 1, 1970, but do not vary in content from their respective predecessor sections, Cal. Civ. Code §§ 162, 163, 164.

16. Civil Code section 5105 is a new statute, effective January 1, 1970. However, it repeats *in haec verba* its predecessor statute, Civil Code section 161a.

17. The wife's "present, existing and equal" (Civ. Code § 5101) rights are not merely paper fictions. The California courts, in innumerable decisions [see generally, 1 Armstrong, *California Family Law* 585-669 (1965)], have assured that the statute is not "spineless." In fact, for a violation of her rights in the community property, the wife may obtain vindication and relief even after the husband's death. See, *e.g., Ballinger* v. *Ballinger*, 9 Cal.2d 330, 70 P.2d 629 (1937).

from the obligation of the stepfather's duty to support the child, the child's mother (the wife of the stepfather) who is a "relative claiming aid" [42 U.S.C. § 602(a)(7)] has a "resource"—her "present, existing" (Cal. Civ Code § 5105) right to one-half of her husband's earnings—which Congress has commanded must be considered in determining the need of the AFDC claimants.[18] 42 U.S.C. § 602(a)(7). Since the HEW regulation prohibits California's consideration of this resource of the mother claiming aid, it is invalid.[19]

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18. It must be emphasized that California, unlike Connecticut in *Solman* v. *Shapiro*, 300 F. Supp. 409 (D. Conn. 1969), *aff'd mem.*, ... U.S. ....., 38 U.S.L.W. 3115 (October 14, 1969), is not considering the resources of the stepfather or MARS. It is considering the resources of the AFDC claimants—the child and his mother. It is thus irrelevant and unnecessary to discuss the appropriateness of the "essential person doctrine" (see *Solman* v. *Shapiro*, *supra*, 300 F. Supp. at 414-15) upon which HEW apparently justifies its regulation (see A. 52-57) and upon which appellants place considerable emphasis. See Appellants' Brief at 26-8 & nn. 27-31. It matters not that the stepfather or MARS may not be an "essential person." The child and his mother, the persons claiming aid, have resources under California law which the state is directed by section 402(a)(7) of the Act to consider.

19. Appellants seem to be striving to create the impression that the support obligation owed by a natural father to his child is somehow "more enforceable" than the obligation owed by a MARS or stepfather. See Appellants' Brief at 31-2 & nn. 33-37. It is perhaps unlikely that a child in any family, which is by definition, impoverished, will actually sue the "father"—be he a natural father, an adoptive father, a stepfather, or a MARS-father. Nonetheless, the cause of action for a breach of the statutory support duty exists to the same extent in all children of defaulting "fathers." See pp. 12-14, *supra*. So far as civil remedies exist against a "father" *living in the home* with the needy child, in all cases, the child, and not the state (see n. 27, *infra*) must pursue the remedy.

It is true that the obligation owed by a natural father to his child, but not that owed by a stepfather or MARS, is also criminally enforceable. Cal. Pen. Code § 270. Certainly it strains credulity to think, however, that a natural father supports his child because

Appellants, in urging the validity of the HEW regulation, argue that it "reinforces the statutory mandate to maintain and strengthen family life." Appellants' Brief at 26. It is true that the appropriations authorized by Congress in the AFDC program are "[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life. . . ." 42 U.S.C. § 601. But it must be remembered that AFDC assistance is contemplated only for "dependent" children—those who reside with only *one* parent or relative. 42 U.S.C. § 606(a). Thus when Congress speaks in terms of aid to "needy dependent

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of an omnipresent threat of prosecution by the state for failure to do so. But even to the extent that such is true, it must be noted parenthetically that the child's *mother* also is subject to prosecution under Penal Code section 270. One may speculate with approximate equal accuracy that a woman married to a stepfather of a needy child will be prompted to assure, out of fear of criminal prosecution, that *her* vested one-half present interest in her husband's community property earnings is being utilized for her child's support. Moreover, if a man is actually prosecuted for nonsupport, and put in jail after a conviction under Penal Code section 270, he affords *no* "adequate economic protection," *King* v. *Smith*, *supra*, 392 U.S. at 332, and the underlying purpose of the AFDC program will have been subverted.

Appellants note the Congressional preference for "affirmative pursuit of resources." Appellants' Brief at 36-8. To the extent that that argument may overlap their contention that somehow MARS-children are less protected than, *e.g.*, natural children, it must be noted that notwithstanding the obligation of a MARS and a stepfather to support the children in his home, the *natural* father of those children is not relieved of his duty to support them. Cal. Welf. & Inst. Code § 11351. And in California, a natural father, whether his children are legitimate or illegitimate (Cal. Civ. Code § 196a), must support them. If there is a natural father absent from the home, but alive and well elsewhere, his resources may and must be "affirmatively pursued," irrespective of the presence of a stepfather or a MARS.

children and the parents or relative with whom they are living to help maintain and strengthen family life" (42 U.S.C. § 601), it has reference *a priori* to maintaining ties between the needy child and the one parent or relative with whom he resides.

Congress has thus declared it to be a preferable social policy to have a child raised by a parent or relative rather than as an orphan, and toward that end, financial aid is offered to maintain those *half-family* ties. Certainly the HEW regulation furthers that goal—but with a vengeance which disregards the limits declared by Congress. "Family ties" are to be maintained and strengthened at public expense through AFDC only to the extent that there is a need therefor. The extent of the need is to be determined by considering the income and resources of the aid claimants. 42 U.S.C. § 602(a)(7). The HEW regulation, in purporting to compel a disregard of resources of California AFDC claimants, strives to "maintain family life" (42 U.S.C. § 601) *at public expense* when unauthorized, indeed prohibited [42 U.S.C. § 602(a)(7)], by Congress. Therein lies the invalidity of the HEW regulation.

II. The California "Man-in-the-House" Budgetary Rule Comports With the Due Process and Equal Protection Requirements of the Fourteenth Amendment.

A. California Does Not Act to Deprive Appellants of Any Rights Guaranteed Them; A Fortiori, the State Does Not Act in Violation of the Due Process Clause.

California obligates a MARS and a stepfather, to the extent he is able, to support an otherwise needy, dependent child in his home. Cal. Welf. & Inst. Code § 11351 (Appendix A, *infra*). The extent of the man's ability to provide the support is determined according to fixed state administrative standards [see California State Department of Social Welfare, *Public Social Services Manual* ("PSSM") §§ 42-531, 42-535, 44-101, 44-133 (Appendix D, *infra*)], and

to that extent, the AFDC grant is reduced. Appellants characterize this process as the creation of an unconstitutional conclusive presumption that the man is supporting the child. Appellants' Brief at 31-2.

While appellants' characterization of the budgetary rule as a "conclusive presumption" obviously is designed to evoke sympathy and shock, the State of California need not engage in semantic warfare[20] on the issue since appellants' basic argument is without merit. Their Due Process argument is based on the legally unsound premise that *all* needy children must be guaranteed AFDC assistance unless some man *actually is supporting them.* In other words, appellants urge that despite the presence in the home of a "breadwinner," the mother and children remain totally eligible for AFDC assistance unless the "breadwinner" wishes to, and does, comply with the law by paying the support which he owes. That is not the law or the purpose of the Social Security Act as interpreted by this Court in *King v. Smith.*

In examining the origins and purpose of the AFDC program, this Court stated that:

> "The AFDC program . . . was *not* designed to aid *all* needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' *Ibid.* Implicit in this state-

20. The California "budgetary rules" state that the man *must* support the child and not that the man *does* do so.

ment is the assumption that children would in fact be supported by the family 'breadwinner.'

"The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,'* as the repeated use of these terms throughout the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear. To describe the sort of breadwinner that it had in mind, Congress employed the word 'parent.' 49 Stat. 629, as amended, 42 U.S.C. § 606(a). A child would be eligible for assistance if his parent was deceased, incapacitated or continually absent.

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"Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support." *King v. Smith,* 392 U.S. 309, 328-29 (1968) (footnotes omitted) (emphasis added).

Thus, since the intended beneficiaries of AFDC are only "parentless" children, to the extent that the child lives with a legally-obligated breadwinner, "the fact that the man in question does not actually support the child cannot be determinative." *Id.* at 329. By a parity of reasoning, to the extent that a MARS or stepfather is obligated by California law (Welf. & Inst. Code § 11351) to support otherwise needy, dependent children, the extent of actual support is not decisive.

Therefore, appellants are deprived of nothing (and *a fortiori* not in violation of due process of law) by being disallowed the opportunity of demonstrating actual nonsupport by the "man-in-the-house" since the fact "cannot be determinative." 392 U.S. at 329. It is the presence in

the home of the MARS or stepfather coupled with his statutory support obligation which determines AFDC eligibility.

In *King*, this Court noted that "a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance." 392 U.S. at 329. No due process problems inhere in such a situation despite the fact that the child is precluded from showing that the natural father has breached his duty of support. This is so for the simple reason that actual support is critical only in the absence of a *legal duty to support.* The legal duty, together with the Congressional expectation that the duty will be performed (see *King v. Smith, supra,* 392 U.S. at 329), relegates the issue of actual contributions to the realm of immateriality.[21] As this principle applies to the child living with a natural father, perforce it must apply to the step-child or "MARS-child" to the extent of the legal duty owed—precisely as it does under the California budgetary rules.

Appellants' due process argument also seems to have an undercurrent theme that the California budgetary calculations force families living with a stepfather or MARS to exist at unconstitutionally low levels. Appellants' Brief at 47-48. They complain that if the man chooses to obey California law and does support the children in his home, he will be forced "to default on his debts and lose his credit standing," and to "eschew charities, activities, entertainments or other pleasures he might otherwise enjoy,"

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21. One rebels at the notion that the needs of children may ever be considered an irrelevance. However, in directing the manner in which public money is to be distributed through AFDC, Congress has closed the door either partially or wholly, to children who have the possibility of deriving support from a legally-obligated wage-earner rather than from the public coffers. Thus, in determining AFDC eligibility, actual need is not the determining factor *if* there is legal support liability.

and may have to "give up or lose by repossession his car, his television, and anything else being purchased on installment credit." Appellants' Brief at 48.

There probably can be no question that the California budgetary rules constrict the life style preferences of many stepfathers and MARS's. Equally certain is the fact that many natural and adoptive fathers also would prefer to have the state support their children so that they would be free to revel in Elysian pursuits of their own choosing. But the power of the State of California to set priorities on a man's obligations, with child support taking precedence over television sets and automobiles, is so clear as to obviate the need for further discussion. As the District Court observed, appellants should address this complaint of theirs to the California Legislature (A. 47), although one may speculate that their contentions will sound as untenable in legislative Houses as in Courthouses.

A MARS or stepfather, lacking in great material wealth, may face a dilemma in deciding whether to pursue "carefree bachelorhood" or whether to incur obligations (Welf. & Inst. Code § 11351) along with the pleasures of a "wife" and children. But the dilemma is no greater than that faced by an equally unaffluent man who chooses to become a husband and a natural or adoptive father. For he too must incur obligations (Civ. Code §§ 242, 228, *supra*, nn. 7, 8) along with the joys of matrimony and fatherhood. Clearly the existence of such dilemmas is not of constitutional significance.

B. California Welfare & Institutions Code Section 11351 "Classifies" Needy Children in a Manner Which Is Neither Unreasonable Nor "Invidiously" Discriminatory.

Appellants contend that the California "budgetary rules" established by Welfare and Institutions Code section 11351 (Appendix A, *infra*) and the implementing regulations (Ap-

pendix D, *infra*) run afoul of the Equal Protection Clause by according discriminatory treatment to a select group of needy, dependent children—those living with a mother who lives with a stepfather or MARS. They make the conclusory allegation that "California may not consistent with equal protection principles discriminate against needy, dependent children solely on the basis of their mother's relationship to a man in the house." Appellant's Brief at 56. The State of California need not dispute this conclusion as an abstract principle of constitutional law. However, it is a principle inapposite to the California "budgetary rules" for the reason that California does not discriminate against needy, dependent children living with a MARS or stepfather.

In California, all needy children must look to the "man-in-the-house" and must utilize the resource represented by his obligation to provide them support before they may look to the state for welfare money. The needy children living with a MARS or a stepfather are not singled out for any unique treatment. The needy California child living with an employed, natural or adoptive father must derive his economic protection from the man-in-the-house who owes a duty of support (Cal. Civ. Code §§ 242, 228, *supra* nn. 7, 8). So too must the needy child living with a MARS or stepfather who likewise is obligated for support. The actual needs of the stepchild or the "MARS-child," just as with the actual needs of the natural or adoptive child, "cannot be determinative," *King* v. *Smith*, 392 U.S. 309, 329 (1968), because of the existence of the support obligation which Congress, as California, expects will be obeyed.[22]

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22. As the District Court correctly found, "[c]hildren in a MARS family are not discriminated against." A. 42. In the absence of any discriminatory treatment, the question then becomes academic whether the District Court was correct in applying the "traditional" equal protection test of *Morey* v. *Doud*, 354 U.S. 457, 463-64 (1957) (see A. 42), or whether the more stringent "compelling state interest" standards [see *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)] are applicable.

The needy children in homes with a MARS or stepfather are thus put on a parity with equally needy children living with their natural or adoptive father. Section 11351 is the final part of a comprehensive plan that imposes support obligations on all "fathers" of otherwise needy California children—natural fathers,[23] adoptive fathers,[24] stepfathers and MARS-fathers.[25] Thus, not only are the needy children treated equally, but so are all of the "men-in-the-house." There is, therefore, no premium or bonus[26] to the "father" who chooses not to formalize his marriage relationship.[27]

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23. Cal. Civ. Code § 242, *supra* n. 7.

24. Cal. Civ. Code § 228, *supra* n. 8.

25. Cal, Welf. & Inst. Code § 11351, Appendix C, *infra*.

26. The commentators, while in disagreement on many other points, all concur that, absent the support liability imposed by Welfare and Institutions Code section 11351, informal marriages would offer distinct advantages over ceremonial ones because of the incidence of child-support obligations in the latter but not the former. See Note, *Social Welfare: Aid to Needy Children: "Liability of Cohabiting Male for Support,"* 9 U.C.L.A.L.Rev. 261, 262 (1962); Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 Calif. L.Rev. 748, 778-9 (1966); tenBroek, *The Impact of Welfare Law Upon Family Law*, 42 Calif. L.Rev. 458, 483 (1954).

27. In the District Court, appellants specifically contended that the stepfather and MARS (in addition to "their" children) in AFDC homes are denied equal protection (see A. 20, 41), because a similar support duty is not imposed on such men in non-AFDC homes. It is difficult to determine whether that argument is being urged by appellants on this appeal. If it is, it is equally without merit now as it was held to be in the District Court (A. 44-46).

It is true, of course, that a MARS or stepfather in a welfare family has to support the children in his home while one in a non-welfare family does not. However, the man in the welfare family is asking the state to support his children, while the other man is not. It is axiomatic that, consistent with notions of equal protection, the state may accord different treatment to individuals differently situated.

California treats all of its resident needy children similarly and in the manner contemplated by Congress in the creation of the AFDC program. To the extent that the needy child has the resource of a legally obligated "man-in-the-house," Congress and California both expect and require that that resource be utilized before there may be any utilization of tax dollars distributed through AFDC. This rule applies to every California "man-in-the-house"—be he a natural or adoptive father, or a stepfather or MARS.

The Social Security Act does *not* contemplate that despite the presence in the house of a man who is legally obligated to support the children of the household, that if he does not in fact support the children, the state must grant aid to the children and then attempt to recover the taxpayers' money through legal action by the state against the man. Clearly, Congress requires the *state* to affirmatively pursue non-supporting men who are *absent* from the home [see 42 U.S.C. §§ 602(a)(16), (17), (18), (21), (22), as amended by Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 878-9, 896-7], but not for a man who is *present* in the house. This distinction is crucial and one which apparently eludes

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By the same token, it is neither "unreasonable," *Morey v. Doud*, 354 U.S. 457 (1957), nor "invidious," *Shapiro v. Thompson*, 394 U.S. 618 (1969), for California, recognizing the existence of subculture, informal, yet on-going "marriages," tenBroek, *California's Dual System of Family Law (III)*, 17 Stan. L. Rev. 614, 617-19 (1965), to treat such "informal families" in the same manner as formal ones. Thus, California may, with propriety, include in one class, all "fathers" in otherwise impoverished families and impose the burden on them, rather than on the state, to support the children of the family. By so doing, California avoids denying equal protection to impoverished natural fathers and removes any bonus which would otherwise inhere in "common-law" marriages over ceremonial ones.

appellants. See Appellants' Brief 37-8, 57-8.[28] If there is a legally obligated man-in-the-house, Congress expects that he will support the children, *King* v. *Smith*, 392 U.S. 309, 329 (1968), and not that the state must pay aid and pursue the defaulting man. The California plan is in total compliance with the Congressional scheme and applies with consistency to all needy children living wth legally-obligated "fathers."

California has erected no arbitrary barriers which prevent eligible needy children living with a stepfather or MARS from receiving AFDC assistance. It requires such children to look to the man for support not because the mother maintains a relationship with him, as appellants suggest (Appellants' Brief at 59), but because he is under compulsion of California law to provide that support. This is exactly what California does with all needy children living with a legally-obligated father.

CONCLUSION

Unlike the State of Alabama in *King* v. *Smith*, 392 U.S. 309 (1968), the State of California does not flatly deny to needy children "federally funded assistance on the transparent fiction that they have a substitute father." *Id.* at 334.

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28. Appellants suggest that the state should grant AFDC assistance to children living with a MARS or stepfather and then could seek to collect reimbursement from the man in the amount determined to be due. Appellants' Brief at 57-8. They seek to justify this startling proposition with the totally erroneous "comparison" that "[t]his is precisely the method used when a natural father fails to support." Appellants' Brief at 58. It is the method used against a defaulting *absent* natural father. But it is absurd to suggest that California grants assistance to a child *living with* an employed, but disobedient, natural father and then sues the father for restitution. California is prohibited from paying AFDC money to such a child who by definition [42 U.S.C. § 606(a)] cannot be a "dependent" child eligible for aid.

And unlike the State of Connecticut in *Solman* v. *Shapiro*, 300 F. Supp. 409 (D.Conn. 1968), *aff'd mem.* ..... U.S. ....., 38 U.S.L.W. 3115 (October 14, 1969), the State of California does not imagine that a stepfather will support his stepchild when state law says that he need not do so (300 F. Supp. at 412). Rather, California requires every type of "man-in-the-house"—natural and adoptive fathers, stepfathers and men "assuming the role of spouse"—to support the children of the household, if without the support the children's names would have to be placed on the welfare rolls. Congress, and California, anticipate that legal obligations will be performed voluntarily or can be compelled through legal processes. That legal power is a resource which Congress has commanded California to consider in measuring need for public expenditures.

The judgment of the District Court should be affirmed.

Dated: January 26, 1970.

Respectfully submitted,

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Appendix A

California Welfare and Institutions Code Section 11351.
Prior to 1969 Amendment

Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, "adult male person" means any male person of age 18 years or older.

Appendix B

California Welfare and Institutions Code Sections 11351 and 11351.5

As Amended in 1969 (Effective November 10, 1969)

Section 11351

Where a needy child lives with his mother and a stepfather, the amount of the grant made pursuant to Section 11450 of this code shall be computed after consideration is given to the income of the stepfather. The county granting aid shall determine if the stepfather is able to support the child either wholly or in part. The determination shall be based upon a standard which takes into account the stepfather's income and expenses under regulations adopted by the department.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather is bound to support, if able to do so, his wife's children if without support from such stepfather they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section. [Amended by Stats. 1969 ch. 1417 § 1.]

Section 11351.5

Whenever an unrelated adult male resides with a family applying for or receiving aid under this chapter, he shall be required to make a financial contribution to the family which shall not be less than it would cost him to provide himself with an independent living arrangement.

The minimum financial contribution to the family shall be determined in accordance with standards established by the department which takes into account such adult male person's income and expenses. The regulations formulated

by the department shall require the mother of the children and the unrelated male to present all of the facts in connection with the sharing of expenses which comprise the agreement whereby said adult male resides with the family. The conditions of the agreement and the facts related to the sharing of the family expenses shall be signed under penalty of perjury by both the mother of the child and the unrelated male. In the event that either the mother or the adult male person willfully and knowingly fails to cooperate during the period such joint sharing of expenses arrangement exists in setting forth all of the facts in accordance with provisions of this section, aid to the family may be discontinued.

The provisions of this section do not apply to a bona fide paying lodger, roomer or boarder living in the home of a family applying for or receiving aid under this chapter. [Added by Stats. 1969 ch. 1417 § 2.]

Appendix C

Regulations of Department of Health, Education and Welfare
Current (45 C.F.R. § 203.1)

(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availabilty of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in estabishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

Obsolete (HEW, Handbook of Public Assistance, Part IV)

3131. *Requirements for State Plans*

7. Effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter, the State plan must provide that only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment.

3120. *Interpretation*

Availability of Income and Resources

In some States, policy has been in effect whereby income and resources, not actually available, have been assumed to be available to applicants and recipients, and have been considered so as to reduce the amount of assistance and thus the total amount actually available for meeting the essentials of living. To meet this inequity, a requirement is being added, to become effective July 1, 1967, for all new cases, and for all other cases as they come up for redetermination of eligibility thereafter.

Under this requirement, a State must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available for the individual's use in meeting subsistence needs as defined in the State's standard. This means taking into consideration, in determining need and amount of payment, all current income from all sources, such as earnings, OASDI monthly benefits, contributions, etc., actually available to meet the individual's needs on a regular basis (except as required or permitted to be disregarded or set aside under the various titles of the Social Security Act or other Federal law) and in contrast, omitting

from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual.

Thus, income must not be considered where it is not, in fact, *currently* available to the needy individual; e.g., support payments ordered by the court but which are not, in fact, made; contributions which relatives have been determined able to make but which are not, in fact, made; and income from employment assumed to be available in the community when, in fact, the individual is not working.

For cases in which income or resources are initially available, but are then discontinued, e.g., cases in which a payment under a court order, or contributions, continue for several months and then cease, assistance payments will need to be adjusted prompty to reflect this change in circumstances.

Assistance payments must be based on need in the light of currently available income and resources. Current payments cannot be reduced because of prior overpayments, if the recipient no longer has the income available, which occasioned the overpayment. Examples: Unreported income several months ago which is no longer available as well as agency overpayments.

Appendix D

Regulations of California State Department of Social Welfare Appearing in "Public Social Services Manual."

42–515 DEFINITIONS FOR PURPOSES OF SUPPORT RESPONSIBILITY

.1 *Parents*

The natural parents, married or unmarried, are the parents of the child unless the child has been adopted. The adoptive parents are the parents thereafter.

.2 *Stepfather*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.3 *Unmarried Father*

An unmarried father is a man who is not married to the natural mother of one or more of their children even though he may be married to another woman.

.4 *Man Assuming the Role of Spouse*

.41 *Definition*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 *Criteria*

The determination of whether the man has assumed financial obligations or has represented himself as spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

.421 Man has Assumed Financial Obligations

a. Man has paid family bills, opened charge accounts jointly or in his name for use of the

family, or similarly obtained credit for the benefit of the family.

b. The man has paid medical or other bills incurred by the family.

c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike

a. Representation to others, such as landlords, friends, community, as husband and wife.

b. Use of man's name by children for various purposes, including school records.

c. Man's attendance as parent at children's school function.

d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.

e. Children refer to man as father.

f. Substantial use of man's automobile by *AFDC* family or registration in man's and mother's names.

g. Use of AFDC family's address by man for mail, employment records, hospitalization, arrests, etc.

h. No demonstrable or confirmable alternative living arrangement other than with the AFDC family.

.43 *Substantiation of Relationship*

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has the burden of proving that the man has assumed the role of spouse.

.5 *Common-Law Marriage*

California law, in Civil Code Section 63, recognizes any out-of-state marriage as valid as long as it is valid where contracted or performed. In cases in which there was no formal marriage, it may be that a common-law marriage was established in another state. If the parents state they are married to each other, it is assumed that they are lawfully married unless this is refuted by other evidence.

Interpretation

Basic Requirements - Common-law Marriages

In most of the states which recognize common-law marriages, two basic requirements must be met:

1. *Agreement Must Exist to Become Husband and Wife.* This agreement may consist of a written contract, but usually is just a simple, oral statement such as "I take you for my wife" or "You are now my wife." The words used must be in the present tense, and must express an intent to assume the relationship of husband and wife at the time involved and not at some future time. The parties have capacity to enter the agreement. This means that (1) they must be of sound mind; and (2) they must be of the minimum age. At common law and in most states which recog-

nize common-law marriage, the ages are 14 for the male and 12 for the female.

2. ***Must be Cohabitation Following the Verbal or Written Statements.*** Cohabitation is described as living together as husband and wife, each assuming the marital duties implicit in the relationship, usually including but not necessarily predicated on, sexual relations.

If these two facts are established and the state where they occurred recognizes common-law marriages, a marriage is in existence which is valid for all purposes in California and which can only be dissolved by formal divorce even in the state in which it was created. There is no such thing as an informal divorce in the United States.

42-531 THE STEPFATHER

Where a needy child lives with his mother and his stepfather, the amount of grant shall be computed after consideration is given to the income of the stepfather.

.1 *Definition*

A stepfather is a man who is married to the mother of a child of whom he is not the natural father.

.2 *Stepfather's Responsibility for Support*

A stepfather is responsible for the support of:

a. His children from another union living outside the home;

b. His children living in the home;

c. His wife;

d. His wife's needy children, to the extent of his ability, when his wife and her children are living in the home with him.

.3 *County Responsibility—Stepfather in the Home*

The county department is responsible for:

.31 Determining eligibility for *AFDC* of all children in the home.

.311 Children of the stepfather from his current marriage would qualify for aid only on the basis of deprivation due to unemployment or incapacity.

.312 His children of another relationship, living in the home, may qualify for aid on the basis of absence of the natural mother.

.313 The mother's children from another relationship living in the home may qualify for aid on the basis of absence of their natural father.

All eligible children would be carried as a single case.

.32 Determining the composition of the Family Budget Unit (See Section 44-213).

.33 Determining need, income and amount of grant (See Section 44-113.242 and 44-133.1).

.34 Providing services described in the Services regulations.

.35 Taking steps necessary to secure support from absent natural fathers of mother's children (See section 42-517)

42-535 RESPONSIBILITY OF MAN ASSUMING THE ROLE OF SPOUSE

.1 *Definition—Man Assuming the Role of Spouse*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.11 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.12 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; *or*

.13 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

Interpretation — The following factors may substantiate that the man has assumed financial obligations or has represented himself as spouselike.

a. Man has assumed financial obligations

1. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

2. The man has paid medical or other bills incurred by the family.
3. Man has claimed mother and children as dependants in filing income tax.

b. Man represents self as spouselike
1. Representation to others, such as landlords, friends, community, as husband and wife.
2. Use of man's name by children for various purposes including school records.
3. Man's attendance as parent at children's school function.
4. Man is attentive to children and provides recreation, gifts, etc., or admittedly disciplines children.
5. Children refer to man as father.
6. Use of man's automobile by *AFDC* family or registration in man's and mother's names.
7. Use of *AFDC* family's address by man for mail, employment records, hospitalization, arrests, etc.
8. No demonstrable or confirmable alternative living arrangement other than with the *AFDC* family.

These factors should not be considered an exclusive listing, for other similar factors may be used. On the other hand, the existence of a single factory may not be conclusive proof that the criteria are met. For example, a man in a courtship relationship might take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

If the man has assumed financial obligations and/or represented himself as spouselike but there is no proof that he has been in a spouselike relationship, the presumption of a spouselike relationship does not exist and the county has

the burden of proving that the man has assumed the role of spouse.

.2 *Responsibility of Man Assuming Role of Spouse for Support*

The man assuming the role of spouse is responsible for the support of:

.21 His children

.22 To the extent of his ability, the mother and her needy children. He is *not* included in the Family Budget Unit with the mother.

.3 *Responsibility of the County Welfare Department*

The county welfare department is responsible for:

.31 Determining eligibility for *AFDC* of all children living in the home. The children of the man assuming the role of spouse by another relationship who are living with him in the home would qualify for aid on the basis of deprivation due to the absence of their natural mother and are carried as a separate case with their father.

.32 Determining the composition of the Family Budget Unit. (See Section 44-213.1 and .2)

.33 Determining need, income, and amount of the grant. The income to the family budget unit from the man assuming the role of spouse shall be computed in accordance with Section 44-133.5.

.34 Providing services described in the Services regulations and Department Bulletin No. 624 when appropriate.

44-101 INCOME DEFINITIONS

Income, generally, is any benefit in cash or in kind which is in fact currently available to the individual or is re-

ceived by him as a result of current or past labor or services, business activities, interests in real or personal property, or as a contribution from persons, organizations or assistance agencies. To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family in meeting their needs during the budget period. Subject to this limitation and the exemptions and exclusions, as specified in Section 44-111 of this chapter, such benefits are taken into consideration as income in evaluating the need of the recipient and in determining the amount of assistance to which he is entitled.

.1 *Separate Income*

.11 Separate income is derived from an interest in separate property; or,

.12 Income resulting from employment or military service rendered prior to the present marriage.

.2 *Community Income*

.21 Community income is generally income derived from an interest in community property; or,

.22 Income resulting from employment or military service performed during the present marriage or being performed at the time of the present marriage. *However:* If the applicant or recipient of *AB, APSB, ATD* or *OAS* has relinquished his community interest in his spouse's earnings by oral or written agreement, such income is separate income of the spouse. If it is determined that the agreement was made for the purpose of qualifying for aid or for a greater amount of aid, such income is considered community income. Earnings of an ineligible spouse up to $200 monthly net are not considered as community income. (See Section 44-131.132 and W&IC 11012); or

.23 Income from the earnings of a minor child in the home unless the child is free from parental control.

.3 *Current Income*

.31 *Current income of a recipient* is income received in the current month regardless of the period over which it accrued. *However:* (1) interest payments in decreasing amounts may be averaged; (2) if all or a portion of a cash gift or a non-recurring lump-sum payment is determined to be income, it is considered "current income" in the month following receipt (see Section 41-309.3); (3) recurring lump-sum income is considered "current income" in the months to which it is apportioned, starting with the month following its receipt (see Section 44-135.)

Any unexpected portion of current income becomes personal property on the first of the month following receipt of the income.

.32 *Current income of an ineligible spouse* is income received in the current month regardless of the period over which it accrued. Income which is temporary, received periodically, or fluctuates substantially from month to month, shall be treated as current income by converting it to a single monthly money amount based on an average of the anticipated income for the calendar year. This single amount shall be considered as the continuing monthly income from such source until a redetermination is made because of a change in circumstances not anticipated in the original determination. (For Net Income, see Section 44-113. For Division of Income with Spouse and Minor Children, see Section 44-131.1.)

Interpretation—The fact that the actual amount of income received by the ineligible spouse in a given month varies up or down from the estimated average does not mean that the determination regarding allocation to the recipient is necessarily incorrect. As long as the estimated average is a valid one, such estimated income is treated in the same manner as if it were actually received that way.

The reporting responsibility of the recipient and spouse must be considered carefully and agreed upon with them. It will generally be desirable to have all actual amounts of income received by the ineligible spouse reported monthly so that any substantial increase or decrease which would materially alter the anticipated average for the year can be considered and, when indicated, adjustment in the projected average made.

When the income of the ineligible spouse has been determined by reasonable estimate, the amount so determined is not subject to adjustment or correction on an after-the-fact basis with respect to aid already paid except as follows:

1. When the predicted income decreases substantially in a manner not anticipated and such decrease is reported promptly; or
2. When the information on which the estimate was based was incorrect or became incorrect as the result of the recipient and/or his spouse withholding or misrepresenting facts which resulted in the recipient receiving aid to which he was not entitled.

.4 *Casual Income and Income from an Inconsequential Resource*

.41 *Casual income* and inconsequential assistance is income in cash or in kind which is: (1) unpredictable as to amount and time of receipt; (2) of short duration; and (3) of negligible importance in meeting continuing needs under the appropriate aid standard.

.42 *Income from an inconsequential resource* is the net return from an interest in real or personal property which makes no appreciable contribution to the continuing needs of a recipient under the aid standard. (W&IC 11009)

Interpretation—Casual income, inconsequential assistance, and income from an inconsequential resource are excluded by code from consideration as income in determining the amount of the assistance payment.

The Federal Social Security Act provides that in determining need, "any income and resources" of the individual must be considered except a specified amount of earned income. It is not possible to define casual income or income from an inconsequential resource in terms of specific money amounts, a percentage of the grant, a specific number of days employment or any other such method which would tend to minimize individualization of the determination. Rather, circumstances must be evaluated in relation to the individual case to determine if the income is really insignificant and of negligible importance in meeting the needs of the recipient.

The following examples illustrate some types of income which usually are considered casual income or income from an inconsequential resource:

a. Income from occasional labor and services of a temporary nature and which offer no security as a regular source of maintenance.

b. Income from occasional sale of products or resulting from work engaged in wholly or primarily for its therapeutic value, such as knitting, art work, cabinet work, etc.

c. Income from occasional rental of a room which is not ordinarily advertised or listed for rent and which is rented for a short period only.

d. The value of the usual small gifts in kind given in commemoration of holidays and anniversaries; or a gift in kind earmarked for a specific purpose and not useful for meeting the continuing needs of the recipient, such as a gift of a ticket for a trip. Gifts of personal property such as a radio, refrigerator, etc. (Irregular nonrecurring gifts of money are considered personal property pursuant to W&IC 11157.)

e. Returns from home produce from garden, orchard, farm livestock, poultry, firewood, etc., which is sold or exchanged.

f. Interest on securities which has no appreciable significance in meeting continuing needs.

g. Result of occasional barter transactions, such as the exchange of wood produced on the recipient's property for work on the road leading to his house.

h. Dues and membership fees in benevolent, fraternal or other non-profit organizations which are assumed by the organization or by another person on behalf of the recipient.

i. Emergency relief granted a recipient who has lost or spent his grant.

j. Interest on a savings account in a bank, savings and loan association, or other institution authorized to accept savings. (W&IC 11009)

k. Free board and lodging received by a recipient during a temporary absence from his home of not more than one month. (W&IC 11009.1.)

.5 *Earned Income*

Earned income is income received in cash or in kind as wages, salary, commissions or profit from activities such as business enterprise, farming, etc., in which the recipient is engaged as a self-employed individual or as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock or poultry (other than sale of an entire holding). (See Section 44-135.)

Returns from personal or real property, such as net income from rental of rooms, or board and room are considered "earned income" if such returns result from an appreciable and continuous effort on the part of the applicant or recipient.

.6 *Voluntary Contributions*

A voluntary contribution is a contribution for which the contributor has no legal liability. In *ADFC* and *OAS* a contribution by a child is "voluntary" only to the extent that it exceeds the child's legal liability. (See regulations on Responsible Relatives.) Income allocated to an *AB, APSB, ATD* or *OAS* recipient by his spouse as provided in Section 44-131.132 is not considered a "voluntary contribution." However, a contribution to the recipient by a spouse from income which the spouse would otherwise be permitted to retain for his own support, is considered to be voluntary.

.7 *Recurring Lump-Sum Income*

Recurring lump-sum income is: (1) income accrued over two or more months and expected to be received at intervals in the future; and (2) a recurring benefit received less frequently than monthly.

Interpretations—Recurring lump-sum income may include payments received from sources such as crops, pensions, rentals, contributions to meet taxes, stock dividends, salaries, wages or commissions and trust fund payments. Recurring lump-sum income does *not* include:

a. Income received monthly, including any initial lump-sum payment which will be followed by monthly payments from the same source such as OASDI. (Such income is applied toward meeting needs in the month of receipt and any unexpended balance becomes personal property on the first of the following month.)

b. Rental or similar payments covering a one-month period, but received less frequently than monthly because of vacancies, etc. (Such payments are considered in the same manner as income received monthly.)

.8 *Income in Kind*

Income in kind is any benefit received other than in cash. It includes the value of need items provided at no charge. In *AB, APSB, ATD* and *OAS,* it includes the value of need items which a person, home or institution is obligated to provide the recipient pursuant to a partial life care contract, life lease or other agreement.

44-113 INCOME

.23 *Earnings—AFDC*

In order that the use of family income for expenses entailed in employment will not reduce the money available to meet basic and other needs, such expenses are to be deducted from gross earnings as follows:

.231 All involuntary deductions made by the employer.

.232 The standard allowance for food, clothing, and personal incidentals for employment as set forth in the following table:

TABLE OF STANDARD ALLOWANCES FOR FOOD, CLOTHING AND PERSONAL INCIDENTALS RESULTING FROM EMPLOYMENT

Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance	Monthly Take-Home Pay	Standard Allowance
$4 or less	All income	$13	$11	$22	$18
5	$ 4	14	12	23	19
6	5	15	12	24	20*
7	6	16	13	25	21
8	7	17	14	26	21
9	8	18	15	27	22
10	8	19	15	28	23
11	9	20	16	29	24
12	10	21	17	30	25**

* Maximum allowance for children under age 18.
** Maximum allowance for adult or children age 18 through 20.

.233 All other expenses incurred to retain employment. Such expenses include the cost of:

a. Transportation to and from work and on the job if not reimbursed by the employer.

b. Tools and licenses required for the job.

c. Dues to unions, business organization, employee clubs, or similar assessments.

d. Contributions to collections for employee benefits necessary to holding the job.

e. Necessary educational or training expenses related to employment including any necessary publications.

f. Care of children at or in day care facilities when the caretaker is employed.

g. Special safety devices needed by handicapped people and not furnished by the employer or another agency.

h. Telephone service required in connection with employment.

i. Unusual expenses required for employment.

(See Determination of Need Chapter for allowance for expenses to obtain employment.)

.234 Deductions of expenses of employment for children not attending school and not setting aside an amount for further education or preparation for future employment under a plan agreed upon with the county welfare department are limited. For children 16 or 17 years of age, the deductions are limited to the extent that net income to the family is not less than $4.00 per month. For children 18 through 20 years of age, the deductions are limited to the extent that net income to the family is not less than $5.00 per month.

.235 When earnings are from self-employment or operation of a business, the expenses in Items .232 and .233 are deducted with all other normal items of expense incidental to receipt of the income. However, principal payments are not allowed except for tools and equipment essential to the employment.

.236 When an entire item of need in the itemized Cost Schedule is met in kind as a result of service performed, the monetary value of the item as shown in the Cost Schedule is income to the family. The expenses in Items .232 and .233 are deducted with all other normal items of expense incurred in securing the income to determine the net income.

.237 Exempt family earned income (as provided in Section 44-111.23) is to be deducted after all deductions for expenses of employment from income are made.

.24 *Other Deductions from Net Income*

In addition to the deductions described above, deductions for other expenses of persons with income from any source, shall be made as follows:

.241 *Court Ordered Support Payment by Natural Parent*

Deduction for support of a child or spouse not in the home, paid on court order, shall be made not to exceed three months if the parent requests review of the order. If, upon review, the court orders continued support payments, the amount of the court order shall be deducted until the order is changed.

.242 *Stepfather*

Deduction is made from income for:

a. The support payments actually made to or for his dependents living elsewhere.

b. Alimony payments to his ex-wife in the amount of the court order.

c. The cost of medical care of the stepfather and other persons in the Family Budget Unit for whom there is no federal eligibility as child or caretaker.

.243 *Child's Income*

An amount for the child's future and/or current expenditures related to the maximum development of his capabilities shall be deducted whenever income is received by or on behalf of a child. The purpose of the deduction is to provide an incentive to equip him better to participate in constructive activities in which he otherwise may be restricted. The amount for future and/or current needs must be geared to the child's age, his problems, his capacities, and the plan devel-

oped by the county welfare department with the child and family to allow him freedom to use or save income for purposes that promote self-reliance and self-improvement. The amount must be reasonable in relation to the purpose for which it is being set aside.

When the amount deducted, or a portion of it, is to be accumulated and used for *future* needs of the child related to educational, vocational, or employment plans, the funds are to be deposited in a separate account in a legal savings institution in the name of the parent or guardian and the child. Withdrawals may be made from the account for expenses for carrying out these plans as they arise when current income does not meet them. The county welfare department shall inspect the passbook every three months to insure that deposits and withdrawals are consistent with the plan.

44-133

.5 *Income of Unmarried Father and a Man Assuming the Role of Spouse*

.51 The amount the unmarried father or man assuming the role of spouse is able to contribute to the *AFDC* family is net income to the FBU.

.52 In situations in which the children of the unmarried father and mother are eligible for *AFDC* on the basis of unemployment or incapacity of the unmarried father, all the children of either parent in the home may be eligible for *AFDC*. In such cases the unmarried father and the mother and all children are included in the FBU and all income of these persons is income to the FBU.

.53 In all other situations, the ability of either the unmarried father or the man assuming the role of

spouse to contribute to the FBU is determined as follows:

Step 1. Determine total need in accordance with the *AFDC* assistance standard for the family consisting of the members of the FBU, the unmarried father or man assuming the role of spouse, and his children living in the home.

Step 2. Determine total need of the FBU.

Step 3. Compute the difference between the two budgets to determine the amount that represents the need of the unmarried father or man assuming the role of spouse for purposes of establishing his responsibility to meet his own needs and the extent of his responsibility to contribute to the FBU.

Step 4. From the needs determined in *Step 3*, deduct his net income computed in accordance with Section 44-113 to establish his ability to contribute to the FBU.

a. If his income exceeds the need, the excess is income to the FBU.

b. If his income does not exceed the need, there is no income to the FBU. His children are needy and may qualify for *AFDC* as a separate case if his income is less than the need.